No. 94-1422

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IN THE
Supreme Court of the United States
October Term, 1994

JOHN W. MARTIN, *et al.*,

Petitioners,

v.

ROBERT K. WILKS, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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April 6, 1995

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Respondents' opposition ("Opp.") to the petition for *certiorari* ("Pet.") is far more notable for what it omits than for what it says. Respondents utterly fail to discuss several of the questions presented in the petition, implicitly conceding that this Court should grant *certiorari* to review at least the following questions:

- Whether reverse discrimination plaintiffs may rely on invalid tests (and other biased job selection criteria) to demonstrate their entitlement to at-issue jobs?
- Whether the *achievement,* but not the maintenance, of a racially balanced workforce is unconstitutional as a remedy for egregious discrimination by an employer?

- Whether the Constitution and Title VII require slow, prolonged relief instead of swift relief of shorter duration?
- Whether the rights of nonminorities are unduly trammeled if, to remedy decades of blatant employment discrimination, the employer adopts affirmative action measures that have the effect of delaying the promotions of nonminorities by an average of 7-9 months over what would have happened *had the discriminatory scheme been perpetuated*?

The Eleventh Circuit answered each of these questions in the affirmative; respondents do not dispute that this Court, like most of the courts of appeal, has previously answered each in the negative.

The principal argument advanced by respondents is that the Eleventh Circuit's decision in this case is justified by respondents' interpretation of this Court's opinion in *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989), a "landmark decision" that implicitly overturned the prior several decades of this Court's affirmative action jurisprudence directly relating to employment discrimination.[1] Such an interpretation of *Croson*, if justified—which it is not—would suggest that this Court should grant *certiorari*, not deny it, in order to consider the conflict between *Croson*, as extended, and the other decisions of this Court.

Indeed, quite apart from the resulting injustice in the instant case, if left standing the decision below would exacerbate the confusion that exists in the public at large and in the halls of Congress as to the legitimate role and bounds of affirmative

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[1] Heretofore, respondents' principal *Croson*-based argument was that the Decree is invalid because the City failed to make particularized findings of fact prior to negotiating and entering into the Decree. The district court and the Eleventh Circuit explicitly rejected that argument. *Bennett v. Arrington*, 806 F. Supp. 926, 928 (N.D. Ala. 1992), *rev'd sub nom In re Birmingham Reverse Discrimination Empl. Litig.*, 20 F.3d 1525 (11th Cir. 1994) ("BRDEL Appeal II"); BRDEL Appeal II, 20 F.3d at 1539.

action. That role and those bounds present pressing issues of constitutional importance, and this Court should grant *certiorari* to make clear that the Eleventh Circuit was wrong, that *Croson* is not the impediment claimed by respondents, and to reiterate that appropriately defined affirmative action is constitutional.

We first discuss *Croson*, then the fundamental flaw in respondents' position, and finally a number of miscellaneous assertions raised by respondents.

I. CROSON DOES NOT JUSTIFY THE ELEVENTH CIRCUIT'S DECISION.

Croson, like various other decisions of this Court, requires that voluntary affirmative action undertaken by a public entity be justified by a compelling governmental interest and be narrowly tailored to fit the demonstrated need for such action. *Croson* principally concerns the first requirement—compelling governmental interest—and in that regard reemphasizes this Court's decision in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307-09 (1978), that an "amorphous" recital of the existence of "societal discrimination" does not establish a compelling interest justifying remedial measures. Unlike *Croson*, both the district court and the Eleventh Circuit held that the City of Birmingham had a compelling interest to justify race-conscious affirmative action.[2] That interest was not based on a claim of amorphous societal discrimination, but rather on evidence of the City's own past employment discrimination against blacks, which, as the district court found when it entered the Decree, made it likely that the City and Board "would in time be held liable for discrimination against blacks". *United States v. Jefferson County*, 28 Fair Empl. Prac. Cas. (BNA) 1834, 1838 (N.D. Ala. 1981), *aff'd*, 720 F.2d 1511 (11th Cir. 1983). Thus, as both lower courts have agreed, the Decree is not

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[2] Although respondents "continue to maintain . . . that the City lacked a compelling governmental interest", Opp. at 14 n.10, their continued protest is irrelevant: no party has sought review of the Eleventh Circuit's conclusion that the City indeed possessed a compelling governmental interest in redressing past discrimination.

subject to the same "compelling interest" problems as Richmond's plan in *Croson.*

Croson is of little help in evaluating the "narrow tailoring" requirement because it does not directly address that prong of strict scrutiny: "[I]t is almost impossible to assess whether the Richmond plan is narrowly tailored to remedy prior discrimination since it is not linked to identified discrimination in any way. We limit ourselves to two observations in this regard." *Croson*, 488 U.S. at 507. Neither "observation" justifies the Eleventh Circuit's decision or warrants the denial of *certiorari* in this case.

This Court observed that Richmond did not first consider *any* race neutral means to increase minority participation in city contracting. Although respondents claim "the City freely admits that it never considered alternative remedies", Opp. at 24,[3] in fact, both before the negotiations to settle the discrimination litigation and during those negotiations, the City considered, attempted and sought to negotiate for a variety of alternatives.[4] Suggesting that Richmond, a city apparently lacking any evidence of its own racial discrimination in letting contracts, should have considered race-neutral means is a far cry from

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[3] The evidence on which respondents rely for their assertion, 1991 PX 1 (Response of Arrington and the City of Birmingham to Plaintiffs' Interrogatories and Request for Production) Response 6, actually states: "'Alternatives' considered or proposed by counsel for the City previously had been rejected by the Justice Department."

[4] *See* Petition for Writ of Certiorari ("Pet.") at 26-27. The district court explicitly found that the City had considered and attempted a variety of affirmative action mechanisms before negotiating the consent decrees, all of which had been largely unsuccessful. *Bennett v. Arrington*, 806 F. Supp. 926, 929-30 (N.D. Ala. 1992). The Eleventh Circuit's conclusion, relied on by respondents, that entry-level hiring had improved as a result of the injunctive relief ordered by the district court following the 1977 trial, *see* Opp. at 15; Pet. at 28, not only ignores the fact that despite the 1977 order, at the time of the Decree's entry, *no* blacks held any promotional position in the BFRS, 1991 PX 11 at 51, but also depends upon the untenable proposition that a promotional remedy may never exceed race neutrality. *See* Pet. at 11-13.

invalidating Birmingham's effort to settle meritorious litigation brought against it by the United States and private plaintiffs, especially when the City considered and attempted alternatives. See Pet. at 27.

Second, *Croson* observed that Richmond's 30% MBE set-aside was based on the "'completely unrealistic' assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population." 488 U.S. at 507 (quoting *Local 28 of Sheet Metal Workers Int'l, Assoc. v. EEOC*, 478 U.S. 421, 494 (O'Connor, J., concurring and dissenting) (1986). That assumption was not made here: the *uncontested* record evidence established that the relevant labor pool for blacks in fire department jobs was *greater* than their representation in the civilian labor force. 1991 Tr. 152-53, 156-57.[5] Furthermore, as the district court found, the long-term goals were "largely hortatory", *United States v. Jefferson County*, No. CV 75-P-666-S (N.D. Ala. entered May 21, 1991) reprinted in the Appendix to the Martin intervenors' Petition for Certiorari at A166, A177; *aff'd sub nom Ensley Branch, NAACP v. Siebels*, 31 F.3d 1548 (11th Cir. 1994); as discussed at length in our petition, no consequence attended the failure to meet any Decree goals. Pet. at 17-25.

II. RESPONDENTS' OPPOSITION, LIKE THE ELEVENTH CIRCUIT'S DECISION, IS FUNDAMENTALLY FLAWED.

The linchpin of the Eleventh Circuit's decision is its assumption that respondents were, because of their race, denied promotions *to which they were entitled*. The *only* basis on which respondents claim to be entitled to the particular promotions they did not get is that their combination of test score and seniority points was greater than that of some blacks who were

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[5] Like the Eleventh Circuit, respondents suggest that the relevant labor pool for Fire Lieutenant was the tainted pool of Firefighters, which was 9-13% black at the time the Decree was entered, and that any goals in excess of that proportion are unconstitutional. Opp. at 26 n.19. Respondents offer no response to our explanation that the Eleventh Circuit's holding on this issue conflicts with this Court's decisions. *See* Pet. at 12-13.

promoted. Thus, respondents claim that the City "had to jump over some 80 qualified whites in order to certify and promote some black employees." Opp. at 7 n.6. Both the promotional tests and the use of seniority points, however, had serious adverse impact against blacks and were not job-related. Indeed, at the 1985 trial, respondents advanced a number of criteria in an attempt to prove their superior qualifications; the district court rejected each of those. *In re Birmingham Reverse Empl. Discrimination Litig.*, 39 Fair Empl. Prac. Cases (BNA) 1431, 1444 ¶ 97, *rev'd*, 833 F.2d 1492 (11th Cir. 1987), *aff'd sub nom Martin v. Wilks*, 490 U.S. 755 (1989); *see generally* Pet. 15-17.

By reversing the district court and deeming respondents' reverse discrimination claims meritorious, the Eleventh Circuit has held that respondents have been injured merely because the prior discriminatory system was not left in place, and that any effort to dismantle that discriminatory system constitutes reverse discrimination. That holding cannot be squared with any of this Court's affirmative action jurisprudence, which firmly establishes that "innocent persons may be called upon to bear some of the burden of the remedy" for past discrimination. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 281 (1986).[6] As the Seventh Circuit has held (in a case relied upon by respondents):

> If on remand the promotion of the two black lieutenants out of rank order does not survive strict scrutiny, it does not follow that the Billish plaintiffs will win. They have no vested rights in their position on an eligibility list compiled on the basis of an examination that may have been biased in favor of whites.

Billish v. City of Chicago, 989 F.2d 890, 895 (7th Cir. 1993) (en banc); *see also Edwards v. City of Houston*, 37 F.3d 1097, 1115 (5th Cir. 1994) (*reh'g en banc. granted*) (nonminorities "do not have a vested interest in continuing to receive the benefits of

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[6] For this same reason, *Wygant* disposes of respondents' argument that promotional relief can be no greater than a goal equal to the percentage of minorities in a feeder position.

past discrimination"). Without the assumption—wholly rejected by the record evidence and the district court's findings of fact—that respondents were better qualified for the at-issue promotions than petitioners, the Eleventh Circuit's decision collapses, for there is no evidence that respondents' rights have been trammelled *at all*.

III. RESPONDENTS' ATTEMPTS TO DEFEND THE ELEVENTH CIRCUIT'S DECISION ARE FUTILE.

Lawfulness of 50% annual goals: Like the Eleventh Circuit, respondents attempt to distinguish *Paradise* by noting that it concerned court-ordered affirmative action, not a voluntary plan. However, that distinction is irrelevant to the proposition, clearly recognized in *Paradise*, that a short-term goal need not itself be pegged to the relevant labor pool for minorities, but may be fixed at a number in excess of the pool. The Court's holding, which is equally true whether the plan in question is voluntary or court-ordered, is that "the 50% figure is not itself the goal; rather it represents the speed at which the goal of 25% will be achieved." *United States v. Paradise*, 480 U.S. 149, 179 (1987). Furthermore, pursuant to the modifications made by the district court in 1991, *U.S. v. Jefferson County*, No. CV 75-P-666-S (May 21, 1991), all percentage goals terminate as soon as nondiscriminatory selection procedures are put into place—just as in *United States v. Paradise*. 480 U.S. 149, 178 (1987).[7]

Contrary to respondents' assertion, petitioners do not rely on *United Steelworkers of Am. v. Weber*, 443 U.S. 267 (1986), for the proposition that evidence of discrimination "can be shared from jurisdiction to jurisdiction", Opp. at 25 n.18, but for

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[7] Respondents offer no rebuttal whatsoever to the actual promotional practices under the Decree, which demonstrate that all Decree goals, including the 50% annual promotional goal for Fire Lieutenant, were not implemented in a wooden or inflexible manner. *See* Pet. at 23-25. Likewise, respondents do not dispute that the Decree itself contains a variety of provisions assuring its flexibility. *See* Pet. at 22-23.

the proposition established in *Weber* and reiterated in *Paradise*: a percentage annual goal is a permissible means to accelerate affirmative action, even when that goal is in some sense "arbitrary" and higher than the percentage of minorities in the relevant labor pool. Thus, respondents cannot rely on *Croson*'s disapproval of a fixed 30% MBE set-aside goal to support the Eleventh Circuit's decision: the 30% goal was not an annual goal designed to accelerate relief, but was the equivalent of the long-term goals here, which, unlike the 30% set-aside in *Croson*, were set at *less than* the relevant labor pool for black fire department employees. *See* Pet. at 14 n.11.[8]

Achievement of a Racially Balanced Workforce: Respondents, like the Eleventh Circuit, harp on the 50% goals (but not the 28% long-term goals) as "outright racial balancing". *See* Opp. at 25-26. This Court has clearly upheld, as a way to redress past discrimination by an employer, goals providing for the achievement (but not the maintenance) of a racially balanced workforce, taking into account relevant labor pools. *Paradise*, 480 U.S. at 179; *Johnson v. Transportation Agency*, 480 U.S. 616, 635 (1987); *Weber*, 443 U.S. at 208. The 30% MBE set-aside in *Croson* could be characterized as "outright racial balancing" because there was no evidence that, absent discrimination by Richmond, minorities would have chosen the construction profession "in lockstep proportion to their representation in the local population". 488 U.S. at 507. Here, however, the 28% long-term goals are concededly based on relevant labor pools and, unlike the 30% goal in *Croson*,

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[8] Respondents also attempt to distinguish the 50% short-term goal approved by this Court in *Weber* by noting that *Weber* was a Title VII case (not an equal protection case) and perhaps should be overruled. Opp. at 20. If private employers facing only a "manifest imbalance" in their workforce are able to take greater remedial action than public employers faced with a compelling governmental interest resulting from their own prior employment discrimination, or if *Weber* is to be overruled, this Court, not the Eleventh Circuit, must make that decision.

terminated upon achievement—which happened in 1989 (for Fire Lieutenant) and 1991 (for Fire Captain).

Unnecessary Trammelling of Nonminorities: Apart from conclusory allegations that the burden was "not diffused" and that a delay in promotion "is a serious injury", Opp. at 29, respondents simply refuse to confront the actual effect of the Decree on nonminorities. As a result of the "sledgehammer" 50% Fire Lieutenant goal, the promotions of nonminorities were "delayed", on average, approximately seven months *when compared to what would have happened had discrimination against blacks been perpetuated. See* Pet. at 19-21.[9] This Court has never held that slight "delays" in promotion violate the Constitution. To so hold would invalidate all affirmative action, leaving the prohibition of future discrimination as the greatest

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[9] As respondents suggest, Opp. at 29 & n.21, their individual cases are indeed illustrative. The basis of respondents Payne and Click's claims is a promotional "delay" of 19 weeks; Morgan complains of a "delay" of 27 weeks; and Pope of 13 weeks. 1991 Ex. 2. In Chambers' case, the fault lies not with the Decree, but with his stars or himself (depending on one's view of test validity within a racial group). In 1982, Chambers finished 11th in combined seniority and test score, just barely enough to be promoted in rank order. 1991 Ex. 1 (Of course, his "entitlement" is based on the erroneous assumption that the test and points were nondiscriminatory.) He retook the test in March, 1983 and October, 1984, but never again scored high enough to be promoted *even if no blacks had ever again been promoted*, and even though the tests and seniority points continued to discriminate in his favor. 1991 Ex. 1, 2. Between 1982 and 1988, 30 white males were promoted instead of Chambers, 1991 Ex. 1, 2, who has still not been promoted despite the goal's expiration six years ago.

relief one could obtain for egregious past discrimination. This is just the effect of the decision below and reason enough for the writ of certiorari to issue.

CONCLUSION

The Eleventh Circuit's decision fundamentally undermines decades of this Court's affirmative action jurisprudence, jeopardizes the rights of victims of discrimination to obtain speedy redress of their rights, and threatens employers with liability if they choose to settle legitimate race discrimination claims brought against them. For the reasons set forth in the petition and in this reply, petitioners John W. Martin, *et al.*, respectfully urge this Court to grant a writ of *certiorari* to review the above-captioned matter.

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